

**FILED**

NOV 30 2015

*[Signature]*  
CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

\*\*\*\*\*

DAVID H. JOHNSTON,

Plaintiff,

vs.

ROBERT DOOLEY, Warden,  
Mike Durfee State Prison, in his  
official and individual capacities; and  
DENNIS KAEMINGK,  
Secretary of Corrections for the  
State of South Dakota, in his  
official and individual capacities,

Defendants.

CIV 15-4125

ORDER

\*\*\*\*\*

Plaintiff David H. Johnston, an inmate at the Mike Durfee State Prison, filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983. The Magistrate Judge issued a Report and Recommendation on November 10, 2015, Doc. 12. Plaintiff filed objections to the Report and Recommendation on November 20, 2015.

Plaintiff asks for a new Magistrate Judge. No good basis has been shown to support that request and the request is denied.

Plaintiff also objects to certain of the claims being considered in the alternative. Even if considered in the alternative, the claims considered in the Report and Recommendation as in the alternative are moving forward instead of being dismissed. Plaintiff claims that the Defendants are providing a mix of services rather than only library or only direct legal assistance. Whether the claims are in fact in the alternative will be determined as the case moves forward.

The Report and Recommendation is adopted and Counts I, II, III, VII, and VIII will be allowed to go forward. Counts IV, V, VI, IX, X, XI, XII, XIII, and XIV each fail to state a claim and in some instances are frivolous. Plaintiff has asked to amend those Counts. Permission is granted and Plaintiff may amend those Counts.


Defendants need not answer any of the claims until the amended Counts have been subject to screening by the Magistrate and then by this Court. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 12, is ADOPTED and Plaintiff's Objections to the Report and Recommendation, Doc. 13, are denied in part and granted in part.
2. That Counts I, II, III, VII, and VIII will be allowed to go forward but will not be served at this time.
3. That Counts IV, V, VI, IX, X, XI, XII, XIII, and XIV are dismissed as failing to state a claim or frivolous, and Plaintiff's request to amend those Counts is granted.
4. That once Plaintiff has amended Counts IV, V, VI, IX, X, XI, XII, XIII, and XIV, the Court will again screen those Counts. Whatever passes screening will then be served upon Defendants.

Dated this 30<sup>th</sup> day of November, 2015.

BY THE COURT:

  
Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

By:   
Deputy